U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042.
Washington, DC 20529

U.S. Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 10 2005

EAC 03 129 51407

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a soccer sport club. It seeks to employ the beneficiary permanently in the United States as a soccer coach pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $36,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on September 2, 1998, to have a gross annual income of $138,411, net annual income of $4,927, and to currently employ two workers. The petitioner also indicated that the position being offered was not a new position. In support of the petition, the petitioner submitted its 2001 U.S. Corporation Income Tax Return, Form 1120. The tax returns reflect the following information:

Net income	$4,927
Current Assets	$7,739
Current Liabilities	$1,000
Net current assets	$6,739

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage as of the priority date, on March 24, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage "as of" the priority date.

In response, the petitioner asserted that the 2001 tax return demonstrated the petitioner's ability to pay the proffered wage in that year because its gross income was $138,411 and it paid $68,820 in commissions and wages of coaches who worked on a part-time basis.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage "at the time of filing" and, on July 19, 2004, denied the petition. The director provided no explanation for failing to consider the petitioner's assertions regarding commissions and wages paid to part-time coaches.

On appeal, counsel asserts that the petitioner employed an independent contractor, [redacted] for soccer coaching services. The petitioner submits Mr[redacted]s 2001 Form 1099-MISC reflecting $39,055 in nonemployee compensation.

In determining the petitioner's ability to pay the proffered wage during a given period in cases where the petitioner has submitted the required initial evidence pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. As stated above, the petitioner has submitted the initial evidence required by submitting its corporate tax return for 2001. While the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001, the petitioner has now established that it paid an independent contractor more than the proffered wage during that year for services that the beneficiary's employment would replace. Wages already paid to others are typically not available to prove the ability to pay the wage proffered to the beneficiary as of the priority date of the petition. The petitioner, however, named the worker the beneficiary will replace and provided evidence of his wages. The record sufficiently demonstrates that the beneficiary will perform the same services as the worker he will replace. Thus, we are satisfied that this evidence establishes the petitioner's ability to pay in 2001.

Nevertheless, the record is silent as to the petitioner's ability to pay the proffered wage in subsequent years. The director, however, never clearly requested such evidence and did not indicate that the lack of such evidence was the basis of denial. Therefore, we must remand the matter to the director for the purposes of inquiring into the petitioner's ability to pay the proffered wage after 2001.

In addition, the director must address whether the position being offered requires an advanced degree *professional* or whether it requires an alien of exceptional ability. According to 8 C.F.R. § 204.5(k)(2), a "profession" is "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation."

Section 101(a)(32) of the Act provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The director should consider that the Occupational Outlook Handbook, available at http://bls.gov/oco/ocos251.htm#training, provides:

> Public secondary school head coaches and sports instructors at all levels usually must have a bachelor's degree. (For information on teachers, including those specializing in physical education, see the section on teachers—preschool, kindergarten, elementary, middle, and

> secondary elsewhere in the *Handbook.)* Those who are not teachers must meet State requirements for certification in order to become a head coach. Certification, however, may not be required for coach and sports instructor jobs in private schools. Degree programs specifically related to coaching include exercise and sports science, physiology, kinesiology, nutrition and fitness, physical education, and sports medicine.

Therefore, this matter will be remanded for consideration of whether the petitioner had the ability to pay the proffered wage after 2001 and whether the position offered requires an advanced degree *professional* or an alien with exceptional ability. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.